Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LAVERNE BELK,

Respondent

v.

CITY OF ELDON, MISSOURI
RON BLY, STEVE WOOD, BRAD VEATCH, AND
SCOTT HARRISON,

Petitioners.

On Petition for Writ of Certiorari to the United State Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL G. BERRY
HENDREN AND ANDRAE, L.L.C.
221 Bolivar, Suite 300
P.O. Box 1069
Jefferson City, MO 65102
(573) 636-8135

Counsel for Petitioners,
City of Eldon,
Ron Bly, Steve Wood,
Brad Veatch, and Scott Harrison

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QUESTIONS PRESENTED

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court held that in reviewing First Amendment retaliatory discharge claims, the balancing of interests test announced in *Pickering v. Board of Education*, 391 U.S. 563 (1968) must be applied to determine whether an employee's expression is protected by the Constitution. In deciding the present case, the Eighth Circuit did not apply the *Pickering* balancing test because it found "that the defendants failed to demonstrate sufficient evidence of workplace disruption to bring the *Pickering* factors into play." The questions which petitioners present to the Court on this issue are these:

1) Whether a government employer must meet a threshold burden of demonstrating that an employee's conduct caused actual workplace disruption before the reviewing court considers whether the *Pickering* factors justified the employer's corrective action?

2) Whether all issues of fact applicable to the *Pickering* analysis of a given case must be submitted to the jury?

3) Whether the defense of qualified official immunity can be decided against an individual defendant, in a First Amendment retaliation case, without applying the *Pickering* analysis to determine if that individual defendant had objectively reasonable grounds for making the employment decision under review?

LIST OF ALL PARTIES TO THE UNDERLYING PROCEEDING

All parties to the underlying proceeding are listed in the caption.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at *Belk v. City of Eldon*, 228 F.3d 872 (8th Cir. 2000). It is reproduced at A. 1a.[1]

The District Court's judgment, and its order denying the petitioner's post-trial renewed motion for judgment as a matter of law, are not reported. These two documents are reproduced at A. 17a and 40a, respectively.

STATEMENT OF JURISDICTION

The underlying judgment in favor of the plaintiff, Laverne Belk, was entered by the United States District Court for the Western District of Missouri, the Honorable Nanette K. Laughrey, presiding, on November 25, 1998. The district court entered its order denying the defendants' renewed motion for judgment as a matter of law on September 21, 1999.

The Eighth Circuit affirmed the judgment of the District Court on October 2, 2000, and entered its order denying the appellants' motion for rehearing on November 21, 2000.

This Court has jurisdiction to review the Eighth Circuit's decision under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS OF THE CONSTITUTION AND STATUTES

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

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[1] Citation to "A" references the appendix located at the end of this Petition. For convenience, all page citations to the decision under review refer to the copy reproduced in the appendix, not to the pages of the reported opinion.

> right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 42, U.S.C. § 1983, as amended:

> Every person who, under of color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Mo. Rev. Stat. § 79.320 (1986):

> The board of aldermen shall elect a clerk for such board, to be known as "the city clerk", whose duties and term of office shall be fixed by ordinance. Among other things, the city clerk shall keep a journal of the proceedings of the board of aldermen. He shall safely and properly keep all the records and papers belonging to the city which may be entrusted to his care; he shall be the general accountant of the city; he is hereby empowered to administer official oaths and oaths to persons certifying to demands or claims against the city.

STATEMENT OF THE CASE

Laverne Belk brought her federal claims in the District Court under 42 U.S.C. § 1983, as amended. She alleged that the defendants fired her for exercising rights of expression and association protected by the First Amendment to the United States Constitution. The district court had jurisdiction to decide these issues of federal law under 28 U.S.C. § 1331.

The petitioners ask the Court to grant certiorari to review whether the Eighth Circuit decided this First Amendment retaliation case contrary to *Connick v. Myers*, 461 U.S. 138 (1983), by failing to apply the balancing of interests test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968); and whether in denying the individual defendants qualified official immunity, the Eighth Circuit's decision is contrary to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The underlying facts, as discussed by the District Court and the Court of Appeals

At trial, the District Court submitted a verdict directing instruction requiring the jury to find that two separate events motivated the Eldon Board of Aldermen to terminate Laverne Belk from employment in two different jobs she held with the City of Eldon. Before the Board took any action, Belk was Eldon's City Clerk, and she was assistant to the City Administrator.

The District Court's instruction required the jury to find that "plaintiff's statements to Harold Dolby in October 1995 *and* attendance at meetings of the Eldon Concerned Citizens were motivating factors in defendants' decisions." A. 46a (emphasis added). The jury found the issues for Belk, and the District Court entered judgment on the verdict accordingly.

In its order denying defendants' renewed motion for judgment as a matter of law, the District Court summarized the events leading to Belk's firing, and to the Board's related decision against renewing the contract of its City Administrator, James Link. The District Court said:

> The main theory of Belk's First Amendment retaliation claim was that she was fired by the City of Eldon because she spoke with Alderman Dolby in October 1995. In that conversation, she reported that the City Administrator, Jim Link, was having an affair with a city employee and he was paying the employee benefits to

which she was not entitled. Viewing the evidence in the light most favorable to Belk, she proved that her private conversation with Dolby was reported to the city attorney who, in turn, told Jim Link. Other Aldermen were also told about the accusation. The response of the Board was to authorize Link to reorganize the department and to terminate anyone except an elected city official.

At the time, Belk held two positions with the city. She was the assistant city administrator and the city clerk. Her position as city clerk was an elected position and she had been reelected by the Board of Aldermen each April for the last 14 years. Link was, therefore, not able to terminate Belk so long as she was city clerk. Instead, Link removed her title of assistant city administrator, eliminated her supervisory duties, demeaned her publicly, wrote false performance reports and then, five months later, requested the Board of Aldermen to replace Belk as city clerk, and the Board complied. (Footnote omitted, see A.18a).

On the same day that Belk was not reelected as clerk, Link gave Belk notice that the city was contemplating serious disciplinary action against her which could result in her termination. After Belk challenged Link's disciplinary allegations, Link concluded that the Board of Aldermen should decide her fate, not him. The Board then hired an outside consultant, Ivan Schrader, to investigate the conflict between Belk and Link. Schraeder recommended that Belk and Link both be fired. At first, the Board rejected the recommendation and voted to fire Belk but not Link. Then, in an effort to get a unanimous vote, the Board decided to fire Belk immediately and not renew Link's contract, which was set to expire approximately four months later. Link, however, could continue thereafter on a month-to-month basis.

> After Plaintiff was not reappointed as city clerk, she attended some meetings of a group named Concerned Citizens of Eldon. Prior to terminating her, some City Aldermen had told her that her presence at the meetings was inappropriate, given her position with the city.

A. 17a-19a.

In its decision, the Eighth Circuit amplified on two facts discussed by the District Court, stating:

> By all accounts, Belk and Link worked together without incident until Debra Carpenter was hired by the city in 1995. Tensions arose between Carpenter and other city employees under Belk's supervision, and rumors began to circulate that Carpenter and Link were having an extramarital affair.
>
> * * * * *
>
> Faced with the same turmoil in the city administration that led to Belk's termination, the board hired an attorney to act as an independent investigator to evaluate the rumors about Link and Carpenter and the rift in the city's administrative staff and to recommend a solution. The investigator recommended that both Belk and Link be terminated.

A. 2a-3a.

The Eighth Circuit's opinion under review

The Eighth Circuit's decision affirmed the District Court's order in all respects. For purposes of reviewing this Petition, the most important part of the Eighth Circuit's opinion relates to its holding that the *Pickering* analysis was inapplicable to the Board's underlying employment decisions.

The Eighth Circuit ruled that the *Pickering* balancing of interests test did not apply to the present case because the defendants failed to establish that Belk's speech "disrupted the workplace." A. 11a. In pertinent part, the Eighth Circuit held:

> In cases where the public employer cannot demonstrate that the employee's speech disrupted the workplace, however, the court need not proceed to a specific *Pickering* factor analysis absent exceptional circumstances.
>
> * * * * *
>
> Where there is no evidence of disruption, resort to the *Pickering* factors is unnecessary because there are no government interests in efficiency to weigh against First Amendment Interests.

A. 11a.

Next, the Eighth Circuit ruled that the District Court correctly refused the defendants' request to give special interrogatories to the jury on certain *Pickering* factors. In pertinent part, the special interrogatories, which the District Court refused to give, were these:

1) whether "personal loyalty, and confidence of superiors are necessary for one to perform the duties of plaintiff's job";

2) whether Belk's conduct "had a detrimental impact on working relationships between plaintiff and superiors"; and

3) whether Belk was "insubordinate toward her superiors, or engaged in acts which undermined the authority of her superiors."

A. 50a-51a.

In addressing the District Court's refusal to give these interrogatories at the defendants' request, the Court of Appeals said:

> We conclude that the defendants failed to demonstrate sufficient evidence of workplace disruption to bring the *Pickering* factors into play and that the jury charge, as given, fairly and accurately stated the law to the jury.

> Moreover, the jury's specific finding that Belk's speech posed no impediment to the functioning of the city administration obviated the need for interrogatories incorporating the *Pickering* factors.

A. 13a.

In a footnote, the Court of Appeals ruled that Belk's activities with Eldon Concerned Citizens were immaterial to the *Pickering* analysis, even though the jury found that Belk was discharged for attending the group's meetings.

The Court said:

> Our findings upholding Belk's retaliatory discharge claim based on her conversation with Dolby are alone sufficient to require us to affirm the decision of the district court. We therefore decline to address the additional constitutional issues raised by Belk's freedom of association claim.

A. 4a, n. 2.

The Eighth Circuit also held that the individual defendants had no official immunity because they failed to established adequate evidence of workplace disruption to justify firing Belk for speaking to Dolby, stating:

> The crux of the defendants' argument is that, because the evaluation of Belk's claim implicates *Pickering*, they are automatically entitled to qualified immunity. Although we have held that public employers are not required to anticipate the outcome of the delicate *Pickering* balancing, that reasoning applies only to cases where the employer has made some showing of impediment to its efficient functioning. Where, as here, the employer has failed to demonstrate any disruption, there is no balancing to be done and the evidentiary failure is fatal to the claim of qualified immunity.

A. 14a (citations omitted).

Lastly, the Court of Appeals held that advice of counsel did not entitle the individual defendants to qualified immunity because their attorney testified that he was unaware of Belk's statements to Dolby. "The board therefore could not reasonably have relied on his assurances that discharging Belk would not constitute a violation of her First Amendment rights," said the Court. A. 14a.

Additional factual background

1. *Belk's duties in the two jobs she held with the City of Eldon*

Belk was not a resident of Eldon. A. 64a. Her relationship to the City was exclusively through employment.

By statute, Mo. Rev. Stat., § 79.320 (1986), the Board of Aldermen elects its own clerk. The clerk's tenure is set by ordinance. Eldon elects its clerk in April of each year, to a one-year term. In the position of clerk, Belk was the City's chief fiscal officer and records custodian. She attended all of the Board's meetings, including executive sessions, and prepared the minutes. A. 68a-69a.

In her job as Link's assistant, Belk considered herself to be "department head over the administration department." A. 68a. She even attended meetings for Link's A. 70a, and handled personnel matters when he was unavailable. Belk administered payroll and managed a staff of seven to eight workers. A. 68a-69a.

2. *The content and context of Belk's meeting with Alderman Dolby*

As the Eighth Circuit noted, tensions within Eldon's administrative offices had produced a rift among staff members. A. 2a-3a. During the conflict between Belk and Link, rumors started about Carpenter and Link having an affair. A. 2a-3a. In this same time period, an employee supervised by Belk, Rosie Willis, started searching

Carpenter's desk. A. 59a-63a. Willis found unsigned love notes, which she copied and gave to Belk. A. 60a, 62a. Belk kept the copies Willis gave her, and did not chastise Willis for what she had done. A. 62a-63a.

According to Belk, four or five months after Carpenter was hired (which was in January, 1995), Belk discovered that Carpenter was receiving health insurance from the City. This would have placed Belk's discovery in about May or June, 1995. Belk believed this to be improper because Belk thought Carpenter was a "temporary" employee who was not eligible for insurance. A. 71a.

Belk never asked Link about Carpenter's benefits, nor did she ever tell him about the rumors of his affair with Carpenter. A. 57a. At trial, Belk acknowledged that Carpenter was not classified as a temporary employee. A. 65a-67a. Carpenter was a permanent employee from the date of her hiring. A. 65a-66a. Belk offered no documents or other evidence indicating that Carpenter was ineligible for insurance at the time Carpenter started getting these benefits[2].

It was not in dispute that in October of 1995, Belk told Dolby about the rumors of Link's alleged marital misconduct. Belk admitted telling Dolby that "it was a joke on the business district that the City had hired [Link] a girlfriend." A. 71a.

The Eighth Circuit described Belk's allegations about the affair with Carpenter as perhaps having "been in poor taste," but that "they were nonetheless part of Belk's protected speech, because they provided a potential explanation for Link's alleged misuse of public funds." A. 8a.

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[2] Dolby, who was no longer an Alderman by the date of trial, remembered nothing about discussing insurance benefits with Belk in October of 1995. He only recalled Belk telling him things with "sexual overtones." A. 58a.

3. *Belk's association with Eldon Concerned Citizens*

The Eighth Circuit concluded that Belk's meeting with Dolby was protected by the First Amendment, and that the judgment for Belk should stand for that reason alone.

The jury's verdict represents a finding that Belk's meeting with the citizens' committee was a motivating factor in her firing. Belk's role in Eldon Concerned Citizens bears on the issue of whether the Aldermen had constitutionally permissible grounds for discharging Belk, regardless of whether or not the Eighth Circuit correctly held that Belk's statements to Dolby were protected by the First Amendment.

Eldon Concerned Citizens formed after the Aldermen elected Betty Rayhart to replace Belk as city clerk, in April 1996. A. 67a. At the time Belk first met with the committee, Belk knew that one of the committee's goals was "removal of Mr. Link as City Administrator." A. 55a-56a. In addition to meeting, the committee did some public things like picketing city hall. A. 56a. Belk did not actually picket, but she gave the committee "direction as they asked for it on how to form a committee" and she answered questions about parliamentary procedure. A. 56a.

4. *The City's investigation of the problems between Belk and Link*

While Eldon Concerned Citizens remained active, the City hired outside legal counsel, Ivan Schraeder, to "evaluate the rumors about Link and Carpenter and the rift in the city's administrative staff and to recommend a solution." A. 3a. After investigating, Schraeder discussed the litigation consequences of terminating either Belk or Link. He advised the aldermen that they were free to remove Belk, but that Link's contract posed a liability issue. A. 64a. Then, Schraeder recommended removing both Belk and Link, stating:

> My investigation showed that the—literally the City employees had divided up sides and were supporting one

> position or the other. It was my view, after the investigation, that whichever side succeeded if they were still there, that the problems that existed in the City would interfere with and continue to expand to interfere with City's work and it was not a good situation for the City to be involved in.

A. 64a-65a.

Schraeder prepared a detailed report of his findings and recommendations. The Aldermen had the report available while they were deliberating on what to do about the problems created by Belk and Link.

At trial, Belk admitted that in making the decision to terminate her, the Aldermen were "strictly dealing with a conflict between [her] and Mr. Link." A. 54a. She had no reason for believing that any of the Aldermen had personal animosity toward her. A. 54a.

REASONS FOR GRANTING CERTIORARI

The primary reason for granting certiorari is determine whether the Eighth Circuit's decision conflicts with *Connick v. Myers*, 461 U.S. 138 (1983). The petitioners submit that Eighth Circuit's decision conflicts with *Connick* by requiring a governmental body to make a threshold showing that an employee's activities have actually disrupted the workplace, before considering all other factors that bear on the reasonableness of the employer's decision under review. Moreover, the *Belk* decision is but the most recent in a line of Eighth Circuit cases which reflect this same conflicting interpretation of *Connick*.

Certiorari is the appropriate means by which to address apparent conflicts between a decision of this Court and a decision from any of the courts of appeals. *United States v. Doe*, 465 U.S. 605, 610 (1984).

How the decision under review conflicts with *Connick*

In *Connick*, the Court confronted a situation in which a government employee had circulated a petition about office policy within the workplace. After concluding that part of the petition touched on a matter of public concern, the Court held that the employer, Connick, was justified in terminating Myers because he "reasonably believed [Myers' conduct] would disrupt the office, undermine his authority, and destroy close working relationships." *Id.*, at 154.

In overruling Connick's motion for summary judgment, the District Court incorrectly held that Connick had the burden to "clearly demonstrate" that "the speech involved 'substantially interfered' with official responsibilities," because Myers' questionnaire had not "impeded Myers' ability to perform her responsibilities." *Id.*, at 151.

Even though there was no evidence of actual dysfunction within Connick's office, on review this Court held that Connick's decision to terminate Myers was entitled to deference because his concerns with the potential for workplace disruption were objectively reasonable under the *Pickering* analysis. *Id.*, at 151-52. The Court construed *Pickering* to mean that the employer's "burden in justifying a particular discharge varies depending upon the nature of the employee's expression," and that "[t]he *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Id.*, at 150.

Two factors that can weigh heavily in the *Pickering* analysis are the importance of "close working relationships" and the reasonableness of an employer's belief that an employee's actions undermine supervisory authority and "destroy close working relationships." *Connick*, 461 U.S. at 151, 154.

Thus, although the degree of legitimate public concern in an employee's speech may curb an employer's discretion in dealing with resulting problems, the employer is not required to defer taking action until chaos finally breaks loose. The Court said "we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relations is manifest before taking action." *Id.*, at 152.

The Eighth Circuit departs from *Connick* in holding that the *Pickering* analysis is altogether inapplicable unless the government employer first demonstrates actual workplace disruption tied to the employee's expression. In *Belk*, the Eighth Circuit held that the *Pickering* analysis was unnecessary because of a finding that Belk's conduct had not yet impeded the City's operations, stating that: "Where there is no evidence of disruption, resort to the *Pickering* factors is unnecessary because there are no government interests in efficiency to weigh against the First Amendment interests." A. 11a.

This dispositive part of the Eighth Circuit's decision is directly contrary to *Connick*, and *Waters v. Churchill*, 511 U.S. 661, 673 (1994), in which the Court recognized that it has historically "given substantial weight to government predictions of disruption, even when the speech involved is on a matter of public concern." Thus, by failing to apply *Pickering*—and thereby failing to address the importance of close working relationships in Eldon city government, and the impact of Belk's many divisive activities upon working relationships—the opinion imposes an evidentiary standard which was rejected in *Connick* and *Waters*.

An entire line of Eighth Circuit opinions also conflicts with *Connick* in the same manner as the decision under review

The *Belk* decision should be reviewed because it is but the latest in an established line of Eighth Circuit opinions directly conflicting with *Connick*. This line of cases may be traced to its 1990 beginnings in *Powell v. Basham*, 921 F.2d 165, 168 (8th Cir. 1990)(affirming denial of summary judgment because the "[d]efendants have not yet produced any evidence to show that Powell's criticisms adversely effected the efficiency of the department."). This language from *Powell* has taken root within the caselaw of the Eighth Circuit, and has proliferated. See also, *Grantham v. Trickey*, 21 F.3d 289, 294 (8th Cir. 1994)(in which the Court said, "it is critical to determine whether the defendants have put the *Pickering* balancing test at issue by producing evidence that the speech activity had an adverse effect on the efficiency of the public employer's operations."), *Burnham v. Ianni*, 119 F.3d 668, 678-79 (8th Cir. 1997), *Sexton v. Martin*, 210 F.3d 905, 911-12 (8th Cir. 2000)("Before the Court commences the *Pickering* balancing test, however, it is critical to determine whether the defendant has produced sufficient evidence that the speech had an adverse effect on the efficiency of the employer's operations).

None of the other federal courts of appeals have adopted the Eighth Circuit's limiting construction of *Connick*. Left uncorrected this misapplication of *Connick* is sure to continue within the Eighth Circuit, and may infect the caselaw of the other circuits.

The impact of misapplying *Connick*

The Court need look no further than the present case to examine the mischief that results when the *Pickering* balancing test is not applied according to *Connick*. The first serious problem was an error in jury instruction.

1. *The Eighth Circuit incorrectly upheld the District Court's decision refusing to submit special interrogatories on issues of fact relevant to the Pickering balancing test.*

The petitioners do not here challenge the District Court's broad discretion in submitting jury instructions. However, in this instance the District Court selectively submitted some questions of fact applicable to the *Pickering* analysis, but declined to submit others.

The District Court submitted interrogatories asking the jury to find whether Belk's actions "impeded the City of Eldon's government function?" A. 44a. The jury answered in the negative, finding that Belk's actions had not actually impeded "government function." A. 44a. But that finding addresses only one of the many *Pickering* factors applicable to this case.

The Eighth Circuit held that "the district court cannot be said to have abused its discretion by submitting the threshold inquiry, rather than the specific *Pickering* factors to the jury." A. 12a. Here again, the Eighth Circuit's decision reflects that Court's misconstruction of *Connick*. The *Belk* decision reaffirms Eighth Circuit precedent which predicates even considering the government's interests, under *Pickering*, upon a showing of actual workplace disruption. *Connick* does not require proof of actual work place disruption as a pre-condition which must be met prior to examining all of the factors relevant to a *Pickering* analysis of an employment decision.

Certainly the City was justified in placing importance on close working relationships between Belk and the Board which elected her, and between Belk and the City Administrator with whom she worked directly on a daily basis.

Belk held two highly sensitive positions within the City of Eldon. She was the Board's elected clerk, with access to the

City's most confidential documents and meetings. Within the City's administration, Belk worked directly for the man, Link, whom she accused of marital misconduct, and of unsubstantiated financial misfeasance. After making those accusations, Belk took part in organizing a group of citizens who were forming to agitate for Link's firing. According to the findings of the investigator whom the City hired to sort blame for all of this, both Belk and Link were forcing other employees to take up sides in the dispute. Close working relations were falling apart.

Yet the District Court refused to instruct the jury to decide whether "personal loyalty, and confidence of superiors are necessary for one to perform the duties of plaintiff's job," or whether "plaintiff's conduct had a detrimental impact on working relationships between her and superiors." A. 50a. However, these two factors are important to deciding whether Belk's expression and association were protected. A finding for the defendants on these issues of fact would have required giving "a wide degree of deference to the employer's judgment" on how to resolve the situation. *Connick*, 461 U.S. at 151-52.

The petitioners are mindful that deciding whether speech is protected presents a question of law. *Connick*, 461 U.S. at 148, n. 7. However, the factual components of the *Pickering* test have consistently been treated within the Eighth Circuit as issues of fact for decision by the jury. See, *Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993).

This Court has not yet ruled on whether the issues of fact pertaining to the *Pickering* analysis are to be decided by the court or the jury. The Court touched on this question in *Waters v. Churchill*, 511 U.S. 661, 676 (1994). There, the Court suggested that the jury is to decide questions of fact relevant to the *Pickering* analysis. *Id.* If some of the factors relevant to the *Pickering* analysis are to be submitted to the

jury, then in fairness all relevant issues of fact should be submitted.

If the *Belk* decision is permitted to stand uncorrected, trial courts throughout the federal system will have authority for submitting only a single *Pickering* question to the jury, namely: "was there any actual disruption in the workplace?" That is essentially the question which the District Court submitted, in Belk's trial, to the exclusion of all other relevant *Pickering* issues of fact. If a future jury finds no actual disruption of operations, as the jury did in *Belk*, then the Eighth Circuit's decision now holds that the inquiry is over and the plaintiff wins. That is not the intent of *Pickering*.

2. *By examining only the evidence which supported the conclusion that Belk's comments about employee benefits did not impede city government, the Eighth Circuit failed to consider the full context of the dispute which motivated the Board's decisions.*

The Eighth Circuit limited its review of the District Court's judgment to the question of whether Belk's October 1995 statements to Alderman Dolby were protected speech. The Eighth Circuit expressly declined to analyze the impact of Belk's activities with Eldon Concerned Citizens—activities which aided a group trying to get Link fired. A. 4a, n.2.

The jury found that Belk's activities with the committee motivated her firing in May of 1996. Thus, analyzing Belk's freedom of association claim is critical to correctly evaluating the events surrounding the Board's decisions to remove Belk and Link from the City's government.[3]

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[3] Belk's freedom of association claim is analogous to those cases addressing decisions based upon political affiliation. These hold that employees with broad responsibilities—policymakers—may lawfully be held to higher standards of loyalty than other workers, *Eldrod v. Burns*, 427 U.S. 347, 368 (1976), and that an employer's discretion is governed by whether "party affiliation is an appropriate requirement for the

In failing to consider the significance of Belk's activities with Eldon Concerned Citizens, the petitioners believe that the *Belk* decision conflicts with not only *Connick*, but also with *Waters v. Churchill*, 511 U.S. 661, 679-80 (1994), which holds that an employer may take corrective action based upon its reasonable beliefs about the content, and potential impact, of an employee's alleged acts of expression. *Waters*, at 681, also holds that an "employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements."

Waters presented a similar situation to that addressed in Belk's case. Churchill was discharged for making a series of statements critical of management's administration of a hospital. *Id.*, at 665-66. There was some dispute about what Churchill said. Management investigated; talking to Churchill, and to witnesses who overheard Churchill's comments. *Id.* The Court did not attempt to decide whether some of the statements may have been on matters of public concern, and therefore entitled to some level of First Amendment protection. *Id.*, at 681-82.

In this case, Belk and Link lost their jobs for quarrelling. Belk's activities may have included the one statement that the Eighth Circuit found to be on a matter of public concern: Belk's statement about Debra Carpenter's health insurance benefits[4]. Belk neither substantiated this accusation, nor

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effective performance of the public office." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). None of these decisions suggest that an employee has a First Amendment right to openly aid a group which is trying to get her boss fired.

[4] The petitioners have intentionally declined to address whether giving Debra Carpenter's health insurance benefits implicates a matter of public concern, or whether this is just an internal personnel issue. This issue is not the basis on which the petitioners are seeking certiorari. But for a number of reasons which can be later briefed, the petitioners believe that this issue of internal personnel policy is not a matter of public concern.

limited her activities to addressing employee health insurance. The jury found that the totality of Belk's conversation with Alderman Dolby motivated her firing, as did her activities that aided with organizing Eldon Concerned Citizens. Thus, the Board's information about all of Belk's activities, including her association with a group trying to get Link fired, bear on the reasonableness of the Board's disciplinary action.

3. *The Eighth Circuit misconstrued this Court's decision, in Harlow v. Fitzgerald, by holding that unless the individual defendants first established that Belk's activities actually disrupted the workplace, the defendants were not entitled to qualified immunity.*

The Court of Appeals declined to rule that the individual aldermen had qualified immunity because "[w]here, as here, the employer has failed to demonstrate any disruption, there is no balancing to be done and the evidentiary failure is fatal to the claim of qualified immunity." A. 14a (citations omitted).

In *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982), the Court held that:

> . . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Stated a little differently, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).[5]

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[5] In deciding Harlow, the Court assumed that Fitzgerald would have prevailed on his underlying claim against Harlow but for qualified official immunity. See, *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998).

The Eighth Circuit adheres to a rule of construction which holds that when the fact intensive *Pickering* analysis is implicated, "the asserted First Amendment right can rarely be considered 'clearly established' for purposes of the *Harlow* qualified immunity standard." *Grantham*, 21 F.3d at 292. Thus, by declining to balance the respective interests of Belk and the Aldermen, the Eighth Circuit significantly restricted the individual defendants' ability to establish their right to qualified immunity.

In this case, it is far from obvious whether the Board of Aldermen should have reasonably known that Belk had a "clearly established right" to pursue a course of conduct which, in effect, was an attack on her boss. It is far from obvious that Belk's asserted right is clearly established at all.

Even though the City's investigating attorney testified that he did not know of Belk's statements to Dolby (which suggests that they were far less significant at the time of this dispute than they have become in the course of litigation), he gave the Board of Aldermen lawful reasons for terminating Belk and Link: the need for removing both of the people responsible for polarizing City Hall. A. 65a. Thus, the aldermen should have immunity, regardless of whether the Eighth Circuit has correctly applied *Connick* and *Pickering*.

Qualified immunity—for those individuals who must make employment decisions for governmental bodies—is a meaningless protection if it is available only to those officials who correctly anticipate the applicability and outcome of the *Pickering* balancing test in later litigation. The decision under review, if not brought into conformity with *Connick* and *Harlow*, will make that foresight all the more difficult.

CONCLUSION

The Court should grant certiorari for the reasons stated above. Petitioners suggest that upon review, the Court should

remand this case for retrial on issues relating to the importance of close working relationships in Laverne Belk's position, and on issues relating to the impact that Belk's conduct had upon her relations with superiors and coworkers. Furthermore, the case should be remanded with instructions that the lower Court consider the significance of Belk's activities with the group, Eldon Concerned Citizens, in light of the important positions of trust Belk occupied with the City of Eldon. Finally, on review, the decision of the Court of Appeals should be reversed on the issue of qualified official immunity, and judgment for the individual defendants should be entered accordingly.

Respectfully submitted,

MICHAEL G. BERRY
HENDREN AND ANDRAE, L.L.C.
221 Bolivar, Suite 300
P.O. Box 1069
Jefferson City, MO 65102
(573) 636-8135

Counsel for Petitioners,
City of Eldon,
Ron Bly, Steve Wood,
Brad Veatch, and Scott Harrison